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No. 578

SUPREME COURT OF THE UNITED STATES

October Term, 1967

RAYMOND T. BOSWELL, TRUSTEE FOR BLAYLOCK INVESTMENT CORPORATION, INC. ..... *Petitioner*

v.

A. L. SOSEBEE, BERNICE SOSEBEE, and VALLEY VIEW DEVELOPERS, INC. ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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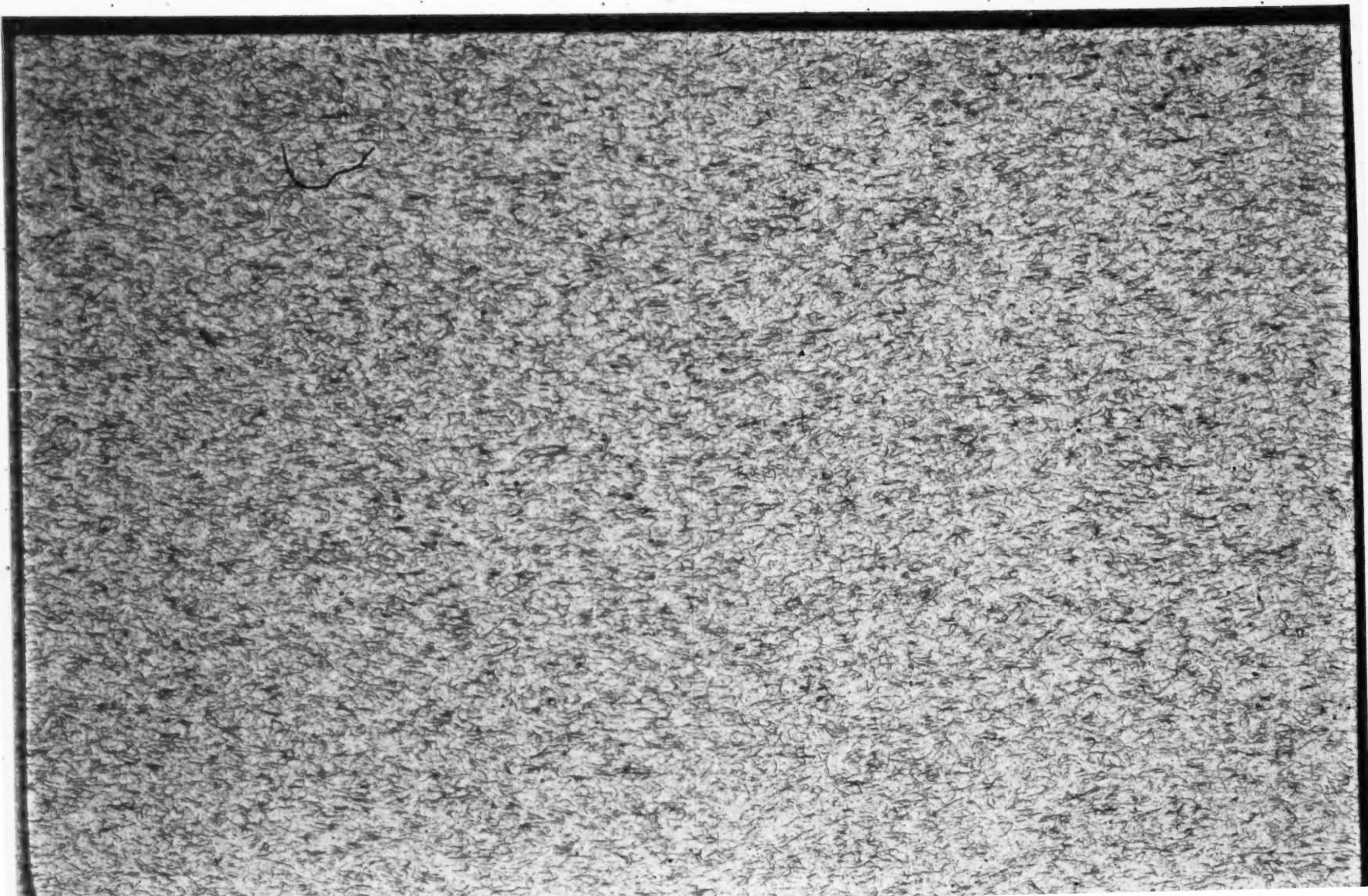
September 19, 1967



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OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported in *Sosebee* v. *Boswell*, 242 Ark. 396, 414 S.W.2d 380 (1967). The petition for rehearing was denied on May 29, 1967 by an unreported order without opinion. (Petition for Certiorari, p. 26.)

JURISDICTION

This Court does not have jurisdiction to grant the writ of certiorari because the petition and the certified record were not filed within ninety (90) days after the judgment of the Arkansas Supreme Court. 28 U.S.C. §2101(c) and

Rule 22 of this Court provide the ninety-day limitation, and this Court has held that the requirement is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399 (1923). The petition for rehearing in the Arkansas Supreme Court was denied on May 29 and ninety days from that date was August 27, 1967, but the Petition for Certiorari in this Court was not filed until September 5, 1967.

The Petition for Certiorari should, therefore, be denied without considering the points raised in the remainder of this response.

QUESTIONS PRESENTED

1. Was a mortgage company's scheme to collect $150 "liquidated damages" from a borrower, A. L. Sosebee *et al.*, respondents herein, if the borrower did not successfully solicit for it new loans on each lot being developed in a subdivision, insulated by the equal protection of the laws requirement of the U. S. Constitution, Amendment 14, from operation of the Arkansas Constitutional prohibition against usury, simply because the Arkansas Supreme Court had held in 1926 in a case involving altogether different parties and altogether different facts, that a savings and loan association's plan to require a customer to maintain a bona fide savings account did not constitute a sham device designed to evade the Arkansas usury law.

2. Was a mortgage company's scheme to collect $150 "liquidated damages" from a borrower, A. L. Sosebee *et al.*, respondents herein, if the borrower did not successfully solicit for it new loans on each lot being developed in a subdivision, insulated by the due process of law requirement of the U. S. Constitution, Amendment 14, from operation of the Arkansas Constitutional prohibition against usury, simply because the Arkansas Supreme Court had never been presented with the identical scheme used by the

mortgage company, where the Arkansas Supreme Court applied its long-established principle that any unfair advantage obtained by a lender from a borrower in addition to the stated interest will be considered as interest.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment 14, regarding equal protection of the laws and due process of law is involved, plus application by the Arkansas Supreme Court of the prohibition against usury in Arkansas Constitution, Article XIV, Section 13 (Ark. Stats. Ann. Vol. I).

STATEMENT

This litigation involves a single, rather complicated arrangement between a mortgage company and one of its borrowers which the Arkansas Supreme Court found to be in violation of the Arkansas constitutional ban against usury.

On May 24, 1965 petitioner mortgage company made a loan to Respondents A. L. Sosebee *et al.* to develop a subdivision. The mortgage company devised a unique and complicated plan whereby the borrower was required in addition to paying the stated rate of interest to pay $150 for each lot developed as "liquidated damages" if the borrower failed to solicit free for the mortgage company the permanent loan on each lot sold. The borrower had no control over where the lot buyers obtained the loans and could not, therefore, prevent the forfeiture of the $150. The mortgage company's agent admitted that the purpose of the arrangement was to compensate for what it deemed to be an inadequate interest rate.

The Arkansas Supreme Court held:

> If this transaction is not usurious, then any transaction can be dressed up so as not to constitute usury although it would be clear that it was merely a scheme to evade the usury laws. (Opinion of Arkansas Supreme Court, page 25 of Petition for Certiorari.)

It was not until after the Arkansas Supreme Court decision that the mortgage company thought to claim that its rights under the United States Constitution, Amendment 14, would be violated by the relief requested by the borrower throughout the State Court proceedings.

The mortgage company did not file this Petition for Certiorari until September 5, 1967, which was ninety-eight (98) days after the Arkansas Supreme Court denied a petition for rehearing. No extension of time had been requested.

Petitioner mortgage company now claims that the holding of the Arkansas Supreme Court violated its right to equal protection of the laws under the United States Constitution, Amendment 14, simply because the Arkansas Supreme Court had held forty-one (41) years earlier that a savings and loan association could require a loan customer to maintain a bona fide savings account without violating the usury law. The mortgage company also contends that its rights to due process of law under the U. S. Constitution, Amendment 14, were violated because it did not anticipate the ruling of the Arkansas Supreme Court despite the existence of a long line of cases in the Arkansas Supreme Court holding that any unfair advantage obtained by the lender over the borrower in addition to the stated interest will be deemed to be interest.

Respondent borrowers, A. L. Sosebee *et al.*, contend that this Court has no jurisdiction to hear the case because the Petition for Certiorari was not filed with this Court within ninety (90) days after the Arkansas Supreme Court judgment. The borrowers also contend that the writ should not be granted because the federal question was raised too late in the state proceedings, is plainly without merit, and is of no importance to anyone except the litigants, who have already had a full hearing in the Arkansas Court.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI WAS FILED AFTER NINETY DAYS

Respondents Sosebee *et al.* wish to emphasize before proceeding with this argument their contention that this Court has no jurisdiction because the Petition for Certiorari was not filed until September 5, 1967, which was ninety-eight (98) days after the Arkansas Supreme Court denied the petition for rehearing on May 29, 1967. No extension of time was requested. 28 U.S.C. §2101(c). U. S. Supreme Court Rule 22.

II. THE ALLEGED FEDERAL QUESTION WAS RAISED TOO LATE IN THE STATE COURT

Petitioner mortgage company concedes in its petition, page 4, that the so-called federal question sought to be reviewed was not raised until the petition for rehearing in the Arkansas Supreme Court, despite the fact that the argument was plainly available since the respondent borrower had requested the very "unconstitutional" relief obtained from the Arkansas Supreme Court in its pleadings, at the trial, and on appeal to the Arkansas Supreme Court. The Arkansas Supreme Court would surely have wanted to hear any arguments that the relief requested by the borrower would violate the U. S. Constitution, and the mortgage company's failure to make the argument before the Court's decision can only be explained by the fact that the so-called federal question is not substantial and was a mere afterthought.

To promote orderly litigation, the Arkansas Supreme Court, like most courts, refuses to hear questions raised for the first time on a petition for rehearing, *Boast* v. *Masters*, 235 Ark. 393, 361 S.W.2d 272 (1962), and its denial of the petition for rehearing without an opinion (Petition, page

26) can be based upon this sound, non-federal ground. This Court has previously adopted the sensible rule that it will presume such denials of petitions for rehearing without an opinion are based upon the adequate non-federal ground and will not entertain petitions for certiorari where the alleged federal questions are not timely raised in the state courts. *Chicago, Indianapolis and Louisville Railway Co.* v. *McGuire,* 196 U. S. 128 (1905).

For failure to raise the alleged federal question before a petition for rehearing in the state court, the Petition for Certiorari should be denied.

III. THE ALLEGED DENIAL OF EQUAL PROTECTION IS PLAINLY WITHOUT MERIT

Petitioner claims that it was denied equal protection of the laws by the Arkansas Supreme Court's holding that its scheme to collect $150 as "liquidated damages" on each lot in a subdivision was a mere scheme to evade the usury law, simply because an Arkansas Supreme Court more than forty years earlier, in a case involving altogether different parties and altogether different facts, had held that a savings and loan association's requirement that a loan customer maintain a savings account was a bona fide, fair arrangement, and not a violation of the usury law. The early case was *Dunbar* v. *State Building & Loan Association,* 171 Ark. 232, 284 S.W. 2d (1926).

The opinion of the Supreme Court in the present case (Petition, pages 7-13) clearly points out the many peculiar distinguishing facts which caused it to hold that this mortgage company's scheme was a mere disguised effort to collect additional interest and evade the usury law. Important in the Court's opinion were many facts not present in the old savings and loan association case, such as the mortgage company's admission at the trial that the scheme was

devised in order to compensate for the inadequate interest rate, the fact that the alleged consideration for the "liquidated damages" was of no value to the borrower, and the fact that the arrangement was craftily drawn by the mortgage company to give the appearance that the "liquidated damages" could be avoided, when in fact the borrower had no control over where the buyers of the lots would obtain their business.

Because decisions by the state courts in cases widely separated in time, vastly different in factual situations and involving a multitude of considerations are almost impossible to compare for the purpose of determining if the various litigants have been treated exactly alike and because old decisions may be overturned by later litigation, this Court had adopted a very common-sense interpretation of Amendment 14 to the effect that it does not apply to the alleged different treatment of different litigants at different times in different factual situations by state courts. As Mr. Justice Brandeis said in *Milwaukee Electric Railway & Light Co.* v. *Wisconsin,* 252 U. S. 100, 106 (1920):

> . . . the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions . . . any more than, in guaranteeing due process, it assures immunity from judicial error . . . the company seeks here to base rights on a later decision between strangers, which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound.

Mr. Justice Brandeis' reasoning was followed by this Court in *Stein* v. *New York,* 346 U. S. 156 (1953) and *Beck* v. *Washington,* 369 U. S. 541 (1962).

The mortgage company's scheme was declared in violation of the usury law not because of alleged unequal treatment with a savings and loan association, but because it was litigated by different parties forty-one years later over

altogether different facts. There was, therefore, no denial of equal protection of the laws.

IV. THE ALLEGED DENIAL OF DUE PROCESS IS PLAINLY WITHOUT MERIT

Petitioner mortgage company also claims that it was denied due process of law simply because it did not anticipate that the Arkansas Supreme Court would hold its scheme to be a mere sham designed to collect excessive interest under false labels, despite the fact that the Arkansas Supreme Court had held many times, in accord with the general law in this country, that any unfair advantage obtained by a lender from a borrower at the time of making a loan will be treated as interest in applying the usury law. The Arkansas Supreme Court cited many of these cases establishing the principle, and its decision was simply an application of the well-settled principles to the unique scheme designed by this mortgage company for the respondents-borrowers.

Because so many variable factors are involved in the process of a state court decision, this Court has adopted the common-sense interpretation of the Fourteenth Amendment that it does not prevent a state from applying its law for the first time to the peculiar set of facts before it. *American Railway Express Co.* v. *Kentucky*, 273 U. S. 269 (1927).

V. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION

The petitioner mortgage company does not even allege that there are "special and important" reasons for granting certiorari, and it is attempting to have this Court review a case where the alleged federal question is plainly without merit, and the outcome of which is of no concern to anyone but the litigants. The complicated and unique scheme devised by the mortgage company on May 24, 1965 to collect

from respondent-borrower excessive interest has apparently never been duplicated and probably never will be. Because of the many circumstances causing the Arkansas Supreme Court to declare the arrangement usurious, the case is unlikely to have any value as precedent one way or the other.

Petitioner mortgage company alleges that the Arkansas Supreme Court decision is "probably not in accord with applicable decisions of this Court," but no conflicting decisions are cited and respondents do not know of any such decisions of this Court.

This case simply involved the application of established principles to another unique factual situation, and there are no special and important reasons for this Court to spend its time analyzing the evidence when it is apparent that the Arkansas Supreme Court fully and fairly considered the case.

CONCLUSION

Petitioner mortgage company failed to file this Petition for Certiorari within ninety days after the judgment of the Arkansas Supreme Court, and this Court, therefore, has no jurisdiction. The alleged federal question was raised too late in the state proceedings, the alleged federal question is plainly without merit, and there are no special or important reasons for this Court to review the judgment of the Arkansas Supreme Court. For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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